

The Four Elements of the Autocrats' Playbook

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[Poland](#) and [Hungary](#) are EU Member States where the rule of law is not safeguarded, and there is concern that more states could soon follow. Meanwhile, the Union's position seems to be relatively weak in relation to rule of law backsliding in its constituent parts: new soft law of questionable quality has been produced by each of the EU Institutions, while positive change is nowhere in sight. This is notwithstanding even the [belated activation](#) of the Article 7(1) of the Treaty on European Union (TEU) mechanism against Poland and the recent move against Hungary, following the [Sargentini Report](#). The situation seems to be evolving extremely fast and only in the direction of the deterioration of the rule of law in the Member States concerned. Making matters worse, there seems to be a total disagreement among essentially all the actors involved concerning what should be done. The political will to sort out the current impasse appears to be lacking also at the level of the Member States, resulting in toxic inaction and an absolute lack of leadership. This helps the autocrats in the backsliding Member States to consolidate their assault upon EU's values even further.

A previously unimaginable situation has arisen, whereby the EU – a block created to ensure democracy and peace in Europe – now harbours Member States which, besides obviously not qualifying for Union membership if they were to apply today, work hard to undermine precisely the founding principles enshrined in Article 2 TEU, that the EU was created to safeguard and promote. Reinforced by [EU funds](#) and the membership of the internal market, Hungary and Poland threw both their weights behind undermining democracy, the rule of law, and the protection of fundamental rights in Europe. All the dynamism of the on-going deterioration of the rule of law notwithstanding, as it turns out the autocrats are not highly innovative. Which tools do they use to deny all the values that the other Member States believe in and are built upon?

There is truth in the old maxim proclaiming the imperative to try to get to know your enemies well. We [outline four key techniques](#) deployed by the autocratic regimes in Poland and Hungary in order to consolidate the constitutional capture and massive assault on European values. The list of tools deployed by both governments to achieve, legitimise, and consolidate the destruction of the rule of law includes four interconnected elements:

1. Appeals to national sovereignty;

2. Fetishisation of 'constitutional identity' taken out of context (i.e. the denial of constitutionalism as such through claiming abuse of power to be part of 'identity');
3. Pleas to national security complete with the harassment of the media, NGOs, and independent educational institutions; and, last but not least;
4. International disinformation campaigns.

Each of the four elements outlined comes with a whole stock of know-how, which the autocrats eagerly deploy, perfect, and also [share](#) among themselves. Let us look at some of the elements of each of the four.

Because we said so

The invocation of national sovereignty often happens without any further justification. Polish capture of the Constitutional Tribunal, the Supreme Court, the National Council of the Judiciary, and ordinary courts happened under the pretext that a so-called 'reform' of the judiciary was a matter for the Member States and the EU had no powers to interfere.

Another example from the same jurisdiction is the dispute related to the felling of trees in the [Białowieża Forest](#), a UNESCO World Heritage Site. Pending the judgment in the main proceedings, the Court of Justice ordered Poland to stop logging. The Polish response was an intensified logging of trees, and Poland even asked for removing the forest from [the UNESCO World Heritage List](#). Reference to national sovereignty came without any convincing justification.

Tautological self-identity

A somewhat more sophisticated variation of the above 'because we said so' technique is the attempt to hide departures from the rule of law behind the veil of constitutional identity. It is of course a [distorted understanding of constitutional identity](#), or even an abuse of the concept.

The Hungarian example is illustrative. When delivering its abstract constitutional interpretation in relation to European Council decision 2015/1601 on supporting Italy and Greece in the refugee crisis, the [Hungarian Constitutional Court](#) invoked constitutional identity. However tautological this may sound, according to the court, 'constitutional identity equals the constitutional (self-)identity of Hungary'. Its content is to be determined on a case-by-case basis based on the interpretation of the constitution, its preamble, and the achievements of the Hungarian historical constitution. This definition is so vague that it can be considered as an attempt to grant a *carte blanche* type of derogation to the executive and the legislative from Hungary's obligations under EU law. In 2018 the concept of constitutional identity was even embedded in the Hungarian constitution.

Foreign agents

The neo-McCarthyist labelling of virtually anyone still capable of formulating dissent as foreign agents is a technique long used, but in Hungary it was taken to a whole new level with the adoption of Lex CEU and Lex NGO, targeting a private university and foreign-funded civil society organisations that are independent of government funds and thereby fit to express government criticism. The explanations of the laws attempting to force the Central European University out of Hungary and to limit public space for NGOs respectively attempt to delegitimise these entities by claiming they pose national security threats to the country.

The security-infused moves demonstrate that the preservation of autocracy is more valuable in the eyes of the executive powers than not harming the key sectors of the national knowledge-economy. In the case of Lex CEU no further explanations were given as to how a leading academic entity could possibly be a threat to national sovereignty, while in the case of Lex NGO, a populist rhetoric was invoked, interlinking NGOs helping asylum seekers and the image of asylum seekers as potential terrorists.

Deception

The fourth technique the autocrats use to undermine the rule of law is disinformation or misinterpretation of the laws and policies of the government. Again Hungary took the lead in 2011 when they sent a wrong translation to Brussels of their controversial new constitution, the Fundamental Law, which looked more in conformity with EU laws and values than the actual text. The Polish and Hungarian responses to EU institutions invitation for a determination of a clear risk of a serious breach by these two Member States of values enshrined in the founding EU Treaties also contain factual mistakes and deliberate deceit.

The very fact that we are now concerned with enforcing values seriously, amounts to nothing else but a concession that the presumption that there is a level playing field amongst all Member States in terms of the rule of law and other values – i.e. the fact that all of them actually adhere to the specific type of constitutionalism the EU set out to promote – does not hold (any more).

Belarusisation from the inside

It is vital to realize, in this context, that in a situation where the core values are not respected by an EU Member State, we are not dealing with a country that is revolting for one reason or another against a binding norm of European law. Rather, we are dealing with a qualitatively different phenomenon: the Belarusisation of the EU from within.

The core question is how to ensure that the EU's own approach to the rule of law does not undermine, if not destroy, adherence to the principle of the rule of law in the Member States, which are, in fact, compliant with the values listed in Article 2 TEU. The discussion should focus in addition to the enforcement of the rule of law – whether by democratically elected or political institutions, or the judiciary, but also on the reform of the Union as a long-term solution. There is time, even while illiberal regimes seem to be there to stay, and the options regarding changing this reality, either supranationally or from a grass-roots level, are limited, if not non-existent.

In the meantime, EU institutions should come to a more subtle realisation of the EU's constitutional role and should not insist on the specificities of EU law trumping all other considerations, including respect for the values the EU and the Member States are supposed to share, but should instead acknowledge the possibility of potential limitations so as to let the foundations of the EU, as provided for by the Lisbon Treaty, evolve.

This implies, *inter alia*, eventual substantive limitations on the *acquis* of the Union as well as taking Article 2 TEU values to heart in the context of the day-to-day functioning of the Union, elevating these above the instrumentalism marking them today. The result would be an emergence of a supranational constitutional system at the EU level, which would be truer to the glorious 'constitutional' label, and which would play a significantly more productive role in solving the backsliding challenges in the Member States, where the war against all what we believe in is currently waged.

